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NO. 84-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF SUGAR LAND AND WALTER WOLF,
Petitioners

v.

SIGNAD, INC.,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether SignAd's Case Should Have To Be Asserted As A Compulsory Counterclaim In Sugar Land's State Court Action.

2. Whether The Court Of Appeals, In Ruling That Application Of The *Colorado River* Abstention Doctrine Was Unwarranted Under The Facts In This Case, So Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
STYLE OF CASE	1
STATEMENT OF THE CASE	2
ARGUMENT AND AUTHORITIES	5
CONCLUSION	28
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

CASES

	Page
Abcko Music, Inc. v. Beverly Glenn Music, Inc., 554 F. Supp. 410 (S.D.N.Y. 1983)	26
Astro Sign Company v. Sullivan, 518 S.W.2d 420 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.)	9
P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2nd Cir. 1951)	14, 17
Brillhart v. Excess Insurance Company of America, 316 U.S. 491 (1941)	14
Caplinger v. Carter, 541 F.Supp. 716 (D. Kan. 1982)	27
Carr v. Grace, 516 F.2d 502 (5th Cir. 1975)	14
Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)	12
Colorado River Conservation District v. United States, 424 U.S. 800 (1976)	5, 12, 13, 14, 15, 16, 17, 18, 22, 24, 25, 26, 28
Moses H. Cone Memorial Hospital v. Mercury Construction Company, 460 U.S. 1 (1983)	17, 18, 19, 22, 24, 26, 28
County of Alleghany v. Frank Mashuda Company, 360 U.S. 185 (1959)	13
Curtis v. J. E. Caldwell & Co., 30 F.R. Serv. 2d 902 (E.D. Pa. 1980)	7, 9
Devlin v. Sosbe, 465 F.2d 169 (7th Cir. 1972)	21
Diamond v. Terminal Railway Alabama State Docks, 421 F.2d 228 (5th Cir. 1970)	10
Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983)	20
Evans Transportation Company v. Scullin Steel Company, 693 F.2d 715 (7th Cir. 1982)	25, 27
Federman v. Empire Fire and Marine Insurance Co., 597 F.2d 798 (2nd Cir. 1979)	10
Forehand v. First Alabama Bank of Dothan, 727 F.2d 1033 (11th Cir. 1984)	19, 20, 26, 28
Gilbert v. School District No. 50, 75 F.Supp. 505 (D. Col. 1980)	21
Giles v. Railroad Express Inc., 30 F.R. Serv. 2d 816 (S.D. Miss. 1981)	10
Great Lakes Corporation v. Herbert Copper Co., 286 F.2d 631 (3rd Cir. 1961)	8
Henry v. First National Bank of Clarksville, 595 F.2d 291 (5th Cir. 1979)	21
Herrington v. County of Sonoma, 706 F.2d 938 (9th Cir. 1983)	19
Kerotest Manufacturing Company v. C-O-TWO Fire Equipment Company, 342 U.S. 180 (1952)	14
Kruse v. Snow Shoe Company, 715 F.2d 120 (4th Cir. 1983), *cert. denied*, ____U.S.____, 104 S. Ct. 1413 (1984)	19

CASES

	Page
Livingston v. Gage, 581 S.W.2d 187 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.)	10
Marino v. Henckel, 431 F.2d 1299 (5th Cir. 1970)	21
Meridith v. City of Winter Haven, 320 U.S. 228 (1943)	13
Mitchem v. Foster, 407 U.S. 225 (1972)	21, 27
Mottolese v. Kaufman, 176 F.2d 301 (2nd Cir. 1949)	14, 17
Parklane Hosiery Co. v. Shore, 429 U.S. 322 (1979)	11
Plant v. Blazer Financial Services, Inc. of Georgia, 598 F.2d 1357 (5th Cir. 1979)	7, 8
Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 454 (1939)	14
Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941)	13
Shaffer v. Heitner, 433 U.S. 186, 199 (1977)	22
Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984)	21
Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1980)	21, 24
United States v. Aronson, 617 F.2d 119 (5th Cir. 1980)	9
Younger v. Harris, 401 U.S. 37 (1971)	13

STATUTES, RULES AND ORDINANCES

26 U.S.C. § 6672	9
42 U.S.C. § 1983	3, 10, 20, 21, 22, 24, 26, 27
Arbitration Act, 9 U.S.C. § 4	18, 19
McCarran Amendment, 43 U.S.C. § 666	15, 16, 18
Rule 34.2 of the Rules of the United States Supreme Court	2
Texas Rule of Civil Procedure 92	4
Texas Rule of Civil Procedure 97(a)	6
Fifth Amendment to United States Constitution	3
Sugar Land Sign Ordinance	3, 10, 11, 23

OTHER AUTHORITIES

1A J. Moore, *Moore's Federal Practice* ¶ 0.203 (1983)	17, 21, 28
6 Wright & Miller, *Federal Practice and Procedure* § 1410 (1971)	8
17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247 (1978)	14, 17
17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247 (Supp. 1984)	19
2 R. McDonald, *Texas Civil Practice* § 7.49 (1982)	7

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court Of The United States:

SignAd, Inc. (hereinafter sometimes referred to as "SignAd"), Respondent herein, presents its response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by the City of Sugar Land (hereinafter sometimes referred to as "Sugar Land" or "Defendant") and Walter Wolf (hereinafter sometimes referred to as "Wolf" or "Defendant"), Petitioners herein, and respectfully presents as follows:

STATEMENT OF THE CASE

A. Statement of Facts.

SignAd excepts to Petitioners' Statement of the Case section, which contains inaccuracies and omissions as contemplated by Rule 34.2 of the Rules of the United States Supreme Court (1980). Accordingly, the following is offered as the correct statement of the facts in this case.

SignAd is an outdoor advertising company which has owned and operated signs in the Houston and surrounding area, including Sugar Land, Texas, for over twenty years. One of these signs has become the subject of SignAd's federal suit (hereinafter sometimes referred to as "Sign No. 1"). More specifically, Sign No. 1 was damaged on or about August 18, 1983, when Hurricane Alicia swept through the Gulf Coast area. On November 10, 1983, SignAd applied to Sugar Land and its building inspector, Walter Wolf, for a permit to repair the storm damage occasioned to the sign. SignAd's repair permit application was approved by Petitioners, and it soon purchased materials and began repairing the sign.

On or about December 9, 1983, before SignAd had time to complete the sign repairs, Sugar Land personnel totally destroyed Sign No. 1 and confiscated both the sign remnants and repair materials. To this date, much less prior to the Petitioners' actions of December 9, 1983, SignAd has still not received written revocation of its repair permit, any notice or hearing regarding the purported revocation of such permit, any notice or hearing regarding the condemnation or demolition of the sign, or any opportunities for appeal of any of these matters.

B. Course of Proceedings and Disposition in Courts Below.

The lawsuit underlying this appeal was filed by SignAd against Sugar Land and Wolf on April 18, 1984. SignAd alleged in its complaint that, as a result of the foregoing acts, Sugar Land and Wolf were in violation of 42 U.S.C. § 1983, common law conversion, and the Fifth Amendment's requirement to pay just compensation for the taking of property. The complaint concludes by praying for a judgment for actual and exemplary damages and attorneys fees.

On March 20, 1984, twenty-nine (29) days prior to the filing of SignAd's action, Sugar Land filed suit against SignAd in the 240th Judicial District Court of Fort Bend County, Texas, under Cause No. 45,865, styled *City of Sugar Land v. SignAd, Inc.* In its state court action, Sugar Land seeks (1) a permanent injunction restraining SignAd from operating Sign No. 1 and another, second sign (hereinafter sometimes referred to as "Sign No. 2") also operated by SignAd in Sugar Land, and (2) a mandatory injunction ordering SignAd to remove both Signs Nos. 1 and 2. In support of its request for the prohibitory and mandatory injunctions, Sugar Land alleges that SignAd is in violation of Chapter 17 of the Code of Ordinances of the City of Sugar Land (hereinafter sometimes referred to as the "Sugar Land Sign Ordinance") by: (1) threatening to reconstruct Sign No. 1 without a permit, (2) failing to modify Sign No. 1 to conform to the provisions of the Sugar Land Sign Ordinance, and (3) failing to remove Sign No. 1 as ordered by Sugar Land. Sugar Land also alleged in its petition that both Signs Nos. 1 and 2 have become public nuisances.

SignAd filed its original answer to Sugar Land's petition, asserting a general denial under Texas Rule of Civil Procedure 92. Absolutely no other activity, including motions, pleadings, or discovery, by either party, has occurred in the state court proceedings.

On the other hand, there has been extensive activity in SignAd's federal action. Initially, of course, Sugar Land and Wolf responded to SignAd's complaint by filing their original answer accompanied by a plea in abatement or in the alternative motion to dismiss. While the Defendants' plea and motion remained on submission, both parties also diligently undertook discovery in the federal suit. Specifically, on or about May 31, 1984, Sugar Land and Wolf filed their first set of interrogatories and first request for production of documents, to both of which SignAd timely responded. Shortly thereafter, on or about June 27, 1984, SignAd filed a deposition notice and document request for Wolf. Sugar Land and Wolf next filed on or about July 20, 1984, their objections to Wolf's document request, second request for production of documents, and request for admissions. Finally, on or about August 9, 1984, Sugar Land and Wolf filed a notice of intention to take the oral deposition of Kenneth Hardgrave, a former employee of SignAd. On August 21, 1984, the very day scheduled for the depositions of Wolf and Wes Gilbreath, Jr., a SignAd employee, and the responses to the document request and requests for admissions, counsel for both parties received in the mail the District Court's order.

The Honorable Robert O'Conor, United States District Court for the Southern District of Texas, Houston Division, signed the order underlying this appeal on August 16, 1984. In the order, the District Court granted Peti-

tioners' plea in abatement or in the alternative motion to dismiss, and it ordered that SignAd's case be dismissed without prejudice.

On February 28, 1985, the United States Court of Appeals, 5th Circuit, issued an opinion reversing and remanding the District Court's decision. In so doing, Circuit Judge Reavley, writing for the Court, relied exclusively upon the inappropriateness of abstaining under the *Colorado River* doctrine in the facts of this case.

ARGUMENT AND AUTHORITIES

1. Whether SignAd's Case Should Have To Be Asserted As A Compulsory Counterclaim in Sugar Land's State Court Action.

Unlike the typical plea in abatement or abstention cases, SignAd is not currently seeking similar relief in state and federal court proceedings. Ironically, Sugar Land argues that SignAd should be required to reassert its claims in the pending state court action. Specifically, Sugar Land initially contends that SignAd's claims arise out of the transaction or occurrence that is the subject matter of its claims, and that SignAd's claims should therefore be asserted as compulsory counterclaims in its state court suit. Thus, SignAd would then be seeking identical relief in both the state and federal courts, allegedly justifying abstention in the federal suit.

The Court of Appeals, however, did not address Sugar Land's threshold contention. Instead, it was able to dispense with the entire appeal by ruling that abstention was unwarranted under the facts in this case, in any event. This Court, however, need not even reach the abstention question in order to arrive at the same result as the Court

of Appeals. Specifically, the controlling authorities, which are discussed below in order to present the argument in a more logical and sequential fashion, indicate that SignAd's case should not have been asserted as a compulsory counterclaim in Sugar Land's state court action, in the first place. Accordingly, SignAd would not be seeking identical relief in both the state and federal courts, dispensing with the need to even consider the propriety of abstaining.

Texas Rule of Civil Procedure 97(a), which governs the assertion of compulsory counterclaims under Texas law, provides in pertinent part as follows:

> (a) *Compulsory counterclaims.* A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction . . .

Thus, when the following six elements concur, a counterclaim is compulsory; otherwise, it may constitute a mere permissive counterclaim, which need not be asserted in the opposing party's action:

1. It must be within the jurisdiction of the court.
2. It must not at the time of filing the answer be the subject of a pending action.
3. It must at the time of filing the answer be mature and be owned by the pleader.

4. It must arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim."
5. It must be against an opposing party in the same capacity.
6. It must not require for its settlement "the presence of third parties of whom the court cannot acquire jurisdiction."[1]

Only the fourth element is in dispute here. Numerous tests have been articulated attempting to clarify when a counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and to promote the Rule's policy of avoiding piecemeal litigation and multiplicity of suits. "[P]iecemeal litigation . . . [and] multiplicity of suits is properly avoided when, for example, there is an identity of facts and issues of law for both claims, and the evidence at trial would be substantially the same for both. In addition, both the original and the counterclaim are part of the same basic controversy so that res judicata would bar a subsequent suit on defendant's claim even absent a compulsory counterclaim rule."[2] Similarly, in *Plant v. Blazer Financial Services, Inc. of Georgia,*[3] the Fifth Circuit suggested the following four tests to further define when a claim and counterclaim arise from the same transaction:

1. Are the issues of fact and law raised by the claim and counterclaim largely the same?

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1. 2 R. McDonald, *Texas Civil Practice* § 7.49, at 253-254 (1982).

2. *Curtis v. J. E. Caldwell & Co.*, 30 F.R. Serv. 2d 902, 903-904 (E.D. Pa. 1980).

3. 598 F.2d 1357 (5th Cir. 1979).

2. Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?

3. Will substantially the same evidence support or repute plaintiff's claim as well as defendant's counterclaim?

4. Is there any logical relation between the claim and counterclaim?[4]

However, the *Plant* court noted that the test accepted by most courts is the logical relation test, which has been described as follows:

> The phrase "logical relationship" is given meaning by the purpose of the rule which it was designed to implement. Thus a counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. When multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and economy require that the counterclaimant be permitted to maintain his cause of action. Indeed the doctrine of res judicata compels the counterclaimant to assert his claim in the same suit for it would be barred if asserted separately, subsequently.[5]

The Texas and federal cases applying these tests under situations closely analogous to this case have determined that such counterclaims were not compulsory. For ex-

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4. *Id.* at 1360, quoting 6 Wright & Miller, *Federal Practice and Procedure* § 1410, at 42 (1971).

5. *Great Lakes Corporation v. Herbert Copper Co.*, 286 F.2d 631, 634 (3rd Cir. 1961).

ample, in another case involving an outdoor advertising company, *Astro Sign Company v. Sullivan*,[6] an employee initially sued his employer seeking recovery of withheld commissions. The employer subsequently sued the employee in another Texas court for conversion and interference with contractual relationship. Like Sugar Land in this case, the employee filed a plea in abatement requesting that the employer's action be dismissed because it was not asserted as a compulsory counterclaim. Even though both parties' claims arose from the employment, the appellate court determined that the employer's was not a compulsory counterclaim.[7] Likewise, in *United States v. Aronson*,[8] a taxpayer sued the Government for a refund of overpaid income taxes, and the Government later filed a separate suit seeking "responsible officer" penalty assessments against the taxpayer under 26 U.S.C. § 6672. The Fifth Circuit applied the logical relationship test and concluded that the Government's claim did not arise out of the same transaction or occurrence as the taxpayer's claim, noting that "at best, the two claims are only incidentally related."[9] Finally, in *Curtis v. J. E. Caldwell & Co.*,[10] the plaintiff sued for breach of contract over the purchase of a diamond from the defendant. The court once again held that the defendant's counterclaims for the unpaid balance due on the original diamond purchase

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6. 518 S.W.2d 420 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

7. *Id.* at 426.

8. 617 F.2d 119 (5th Cir. 1980).

9. *Id.* at 121.

10. 30 F.R. Serv. 2d 902 (E.D. Pa. 1980).

and breach of two separate diamond purchase agreements between the parties were not compulsory.[11]

In applying the foregoing tests to the facts in this case, it is clear that SignAd's claims did not arise "out of the transaction or occurrence that is the subject matter" of Sugar Land's claims. First, the legal and factual issues raised by Sugar Land's and SignAd's claims are extremely different. For example, Sugar Land seeks to enjoin SignAd from operating two signs within its city limits, allegedly because of SignAd's violation of various provisions of the Sugar Land Sign Ordinance. Accordingly, Sugar Land's action will require analysis of a municipal ordinance and the traditional elements for injunctive relief, such as inadequate legal remedies, maintenance of the status quo, and irreparable harm. On the other hand, SignAd has raised completely different legal issues by asserting causes of action against Sugar Land and another defendant, Wolf, for violations of 42 U.S.C. § 1983, conversion, and taking of property without just compensation. The facts

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11. *Id.* at 903-904. *Accord, Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970) (employer's counterclaim for deliberate and negligent failure to follow proper demurrage accounting procedures held not compulsory to employee's claims for wrongful discharge and withholding of wages); *Federman v. Empire Fire and Marine Insurance Co.*, 597 F.2d 798 (2nd Cir. 1979) (counterclaims asserting causes of action under state law for fraud, injurious involvement, and breach of warranty held not compulsory to claim for violation of the federal securities laws); *Giles v. Railroad Express Inc.*, 30 F.R. Serv. 2d 816 (S.D. Miss. 1981) (employer's counterclaims for malicious prosecution, quantum meruit, and civil conspiracy to prevent it from carrying on its business and to obtain unjust enrichment for the plaintiff held not compulsory in employee's Title VII action for racially discriminatory and retalitory employment practices); *Livingston v. Gage*, 581 S.W.2d 187 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (action for breach of a promissory note allegedly related to purchase of oil and gas properties held not compulsory counterclaim in action for recovery of the oil and gas properties under theories of fraud and constructive or resulting trust).

alleged by SignAd supporting these distinct causes of action are also unique: whether the Defendants destroyed one of SignAd's signs and confiscated SignAd's repair materials; whether the Defendants committed such acts under color of law; whether Defendants afforded SignAd due process in the commission of such acts; and the damages incurred by SignAd as a result of such acts.

Second, precisely because the factual and legal issues in SignAd's and Sugar Land's actions are so different, a judgment in either case would not be res judicata in the other. "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privities based on the same cause of action."[12] Accordingly, since the causes of action, as well as the facts and legal theories necessary to urge such causes of action, are very different in SignAd's and Sugar Land's suits, a judgment on the merits in either one will not bar proceedings in the other.

Third, it also follows that the evidence to support or refute the respective parties' claims will be different. Specifically, the evidence in Sugar Land's case will examine the history, maintenance, and operation of SignAd's signs, and how they relate to the requirements of the Sugar Land Sign Ordinance. By contrast, the evidence in SignAd's suit will include testimony and documents regarding the Defendants' conversion of SignAd's sign under color of law and without due process.

Finally, it is clear that SignAd's and Sugar Land's claims are not "logically related." Rather, since the facts, legal issues, evidence, causes of action, and elements of proof are dissimilar, separate trials would not involve a

12. *Parklane Hosiery Co. v. Shore*, 429 U.S. 322, 327 n.5 (1979).

substantial duplication of effort and time by the parties and the courts. Therefore, no matter what test is used, it is clear that this case should not have to be asserted as a compulsory counterclaim in Sugar Land's state court action.

At most, SignAd's claims could be considered a merely permissive counterclaim, which need not be asserted in Sugar Land's state court suit. Therefore, the danger of duplicative action in state and federal courts to warrant abstention does not exist, and the Petition for Writ of Certiorari should be denied.

2. Whether The Court Of Appeals, In Ruling That Application Of The *Colorado River* Abstention Doctrine Was Unwarranted Under The Facts In This Case, So Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The Court of Appeals correctly found that, even if SignAd's complaints were deemed compulsory counterclaims, requiring SignAd to reurge them in Sugar Land's state court action, abstention would still be inappropriate. In so doing, it raised no new questions and merely applied the settled authorities discussed below to the particular facts in this case.

The federal courts have traditionally been very reluctant to refuse to exercise jurisdiction and entertain cases that were otherwise properly before them.[13] During the last few decades, however, the federal courts began to

13. *See, Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821).

recognize certain exceptional circumstances where they may decline to proceed in cases meeting their jurisdictional requirements. This exception is commonly referred to as the "abstention doctrine."[14] While acknowledging the existence of the abstention doctrine, this Court has nevertheless cautioned that it is a very narrow exception to the federal courts' duty to exercise their jurisdiction:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."[15]

Although not technically characterized as a fourth category under the abstention doctrine, the federal courts have also recognized for some time that they may refuse to entertain certain cases, such as *in rem* and declaratory judgment actions, because of the pendency of an action

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14. The "abstention doctrine" has been applied in three types of cases: (1) to avoid deciding a federal constitutional question where the case may be disposed of under state law, *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941); (2) to avoid needless conflict with the administration by a state of its affairs, such as state criminal proceedings or collection of state taxes, *Younger v. Harris*, 401 U.S. 37 (1971); and (3) to leave to the states the resolution of unsettled questions of state law, *Meridith v. City of Winter Haven*, 320 U.S. 228 (1943).

15. *Colorado River Conservation District v. United States*, 424 U.S. 800, 813 (1976), quoting *County of Alleghany v. Frank Mashuda Company*, 360 U.S. 185, 188 (1959).

in another court.[16] As Professor Wright noted, however, "it had been thought to be the rule that the mere pendency of an action *in personam* in state court would not require, nor even permit, a federal court to refuse to hear an action or stay an action, and that instead both state and federal actions should go forward until one of them resulted in a judgment that might be asserted as res judicata in the other."[17] Nevertheless, the Second Circuit in *Mottolese v. Kaufman,*[18] which was shortly followed by *P. Beiersdorf & Co. v. McGohey,*[19] held for the first time that, where similar actions were pending in both state and federal courts, the federal action could be stayed to avoid duplicative litigation.[20]

The propriety of this fourth category of "abstention" finally was addressed by this Court in *Colorado River Water Conservation District v. United States.*[21] *Colorado*

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16. *See, e.g., Kerotest Manufacturing Company v. C-O-TWO Fire Equipment Company,* 342 U.S. 180 (1952) (if the same issues were presented in an action pending in another federal court, one of those courts could stay the action before it.); *Brillhart v. Excess Insurance Company of America,* 316 U.S. 491 (1941) (where state actions were already pending in which all issues could be effectively determined, federal courts have refused to entertain declaratory judgment actions.); *Princess Lida of Thurn & Taxis v. Thompson,* 305 U.S. 454 (1939) (federal courts have declined jurisdiction in an *in rem* action when a state court had previously taken jurisdiction of the res.).

17. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247, at 506 (1978).

18. 176 F.2d 301 (2nd Cir. 1949).

19. 187 F.2d 14 (2nd Cir. 1951).

20. *Contra, Carr v. Grace,* 516 F.2d 502, 503 (5th Cir. 1975) ("It seems clear that a federal court may not abdicate its authority on the grounds that a similar action is pending in a state court.").

21. 424 U.S. 800 (1976).

River involved the effect of the McCarran Amendment,[22] under which the Government's sovereign immunity is waived to permit its joinder in some state court suits for the adjudication of water rights, on the existence and exercise of federal court jurisdiction to adjudicate federal water rights. The Government brought suit in federal court in Colorado against some 1,000 water users seeking a declaration of the water rights of certain federal entities and Indian tribes. Subsequently, a defendant in that suit sought to join the Government in a state court proceeding for the comprehensive adjudication and administration of all water rights within the river system that was the subject of the federal court suit.

In considering whether dismissal of the federal suit in deference to the state proceedings was appropriate, this Court initially determined that the case did not fall within any of the three traditional categories of the abstention doctrine.[23] Nevertheless, it explained that a dismissal, resting "on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," was still proper.[24] However, the Court emphasized the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," and cautioned that such a dismissal should be applied on an even more limited basis than those under the traditional categories of the abstention doctrine:

> Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting

22. 43 U.S.C. § 666.

23. *Id.* at 814-817.

24. *Id.* at 817.

> the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.[25]

The Court continued by listing some of the "exceptional circumstances" to consider in assessing the appropriateness of such a dismissal, such as (1) which court first assumed jurisdiction over property to the exclusion of the other court, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, and (4) the order in which jurisdiction was obtained by the concurrent forums.[26] No single factor is dispositive; rather, the Court explained that

> a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required. [Citation omitted] *Only the clearest of justifications will warrant dismissal.*[27]

While the Court concluded that several of the foregoing factors counseled against concurrent federal proceedings, by far the most important factor was the McCarran Amendment itself, which evidenced a "clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system."[28] Indeed, Professor Moore has suggested that this Court's heavy reliance in *Colorado River* on the McCarran Amendment provided little sup-

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25. *Id.* at 818. Refer to note 14, *supra*.

26. *Id.* at 818.

27. *Id.* at 818-819 (Emphasis added).

28. *Id.* at 819.

port to the lower court cases, such as *Mottolese* and *Beiersdorf*, staying or dismissing federal actions due to the pendency of state court proceedings:

> [B]ecause the court in *Colorado* relied heavily on the McCarran Amendment as expressive of a policy favoring resolution of federal water claims in state courts, *Colorado* provides little, if any, support for the heretofore discussed lower court cases staying or dismissing federal actions due to the pendency of a state proceeding.[29]

Likewise, another respected commentator reasoned that *Colorado River* actually diminished the occasions appropriate for this fourth type of "abstention":

> The teaching of the *Colorado River* case is that only "exceptional" circumstances will permit a federal court to refrain from exercising its jurisdiction for reasons of wise judicial administration due to the presence of a concurrent state proceeding. Thus the proper occasions for use of the fourth abstention doctrine in the future will be much fewer than they have seemed in the past to some lower courts.[30]

Recently, this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Company*[31] confirmed the suggestions of Professors Wright and Moore that *Colorado River* actually narrowed even further those few limited occasions for use of the so-called fourth prong of the abstention doctrine. In *Cone*, the Hospital sued in state court for a declaratory judgment that it owed Mecury

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29. 1A J. Moore, *Moore's Federal Practice* ¶ 0.203[4], at 2140 (1983).

30. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247, at 519 (1978).

31. 460 U.S. 1 (1983).

nothing under a construction contract and that Mercury had waived its arbitration rights. Nineteen days later, Mercury brought a diversity action in federal court seeking an order compelling arbitration under Section 4 of the Arbitration Act.[32] Even though both the state and federal actions involved the identical issue of whether Mercury was entitled to arbitration, this Court held that the District Court had abused its discretion in staying the federal suit.[33]

This Court in *Cone* initially noted that the *Colorado River* "exceptional circumstances" test was still controlling, but it reiterated the very limited application of the test.[34] However, the Court failed to find any of the four factors counselling towards declining federal jurisdiction, including the special concerns evidenced in the McCarran Amendment.[35] The Court also added two new factors to the test. First, observing that federal law under the Arbitration Act would govern the outcome of both the state and federal actions, the Court felt it significant that "federal law provides the rule of decision on the merits":

> [W]e emphasize that our task in cases such as this is not to find substantial reason for *exercise* of federal jurisdiction by the district court; rather, the test is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances, the presence of state-law issues may weigh in favor of that surrender, . . . the presence of federal-

32. 9 U.S.C. § 4.

33. *Id.* at 19.

34. *Id.* at 14-15.

35. *Id.* at 16.

> law issues must always be a major consideration weighing against surrender.[36]

The second factor that the Court weighed against the grant of a stay was "the probable inadequacy of the state-court proceeding to protect Mercury's rights," especially since the obligation of the state courts to compel arbitration under the Arbitration Act was questionable.[37] Thus, applying all six factors to the case, this Court concluded that the requisite "exceptional circumstances" were not present, reasoning that "if there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal."[38]

The continued emphasis by this Court in *Cone* on the severely limited applicability of the so-called fourth prong of the abstention doctrine led Professor Wright to predict that "there will be rare cases in which 'exceptional circumstances' will exist justifying stay or dismissal because of a concurrent state proceeding, but in most cases neither stay nor dismissal will be proper and the federal court will be obliged to exercise its jurisdiction."[39] Indeed, the cases reported since *Cone* have evidenced more reluctance to apply the doctrine.[40] The most recent example is a case closely analogous to this one. In *Forehand v. First Alabama Bank of Dothan*,[41] the defendant bank had seized

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36. *Id.* at 25-26.

37. *Id.* at 26.

38. *Id.* at 28.

39. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247, at 129-130 (Supp. 1984).

40. *See, Kruse v. Snow Shoe Company*, 715 F.2d 120 (4th Cir. 1983), *cert. denied*, _____U.S._____, 104 S. Ct. 1413 (1984); *Herrington v. County of Sonoma*, 706 F.2d 938 (9th Cir. 1983).

41. 727 F.2d 1033 (11th Cir. 1984).

the plaintiff's property, in which the bank held a security interest, pursuant to a state court proceeding. The plaintiff subsequently filed a 42 U.S.C. § 1983 action in federal court seeking damages for the bank's alleged disposition of her property without due process. In reversing the lower court's dismissal of the complaint, the appellate court acknowledged the reluctance to apply the "exceptional circumstances" test recently evidenced by this Court:

> Recently, in *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, ____U.S.____, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983), the Court reaffirmed its view that *Colorado River* abstention is a doctrine of very limited application and was applied in the *Colorado River* case largely because of the strong federal policy, expressed in the McCarran Amendment, favoring determination of water rights in a single proceeding.[42]

Significantly, the *Forehand* court also held that abstention was especially inappropriate in the types of Section 1983 claims asserted by the plaintiff and SignAd:

> [F]ederal law provides the rule of decision on the Sec. 1983 claim . . . Congress has determined that the opportunity to proceed in a federal forum is necessary to protect the rights of Sec. 1983 plaintiffs. This is not to say that the state court will be harsh toward [the plaintiff's] claims, but
>
> > Congress has deliberately afforded the section 1983 plaintiff an alternative federal forum. It is not for the courts to withdraw that jurisdiction which Congress has expressly granted under section 1983 where such a withdrawal is contrary to the purpose of Congress in extending that alternative forum.[43]

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42. *Id.* at 1035.

43. *Id.* at 1035, quoting *Duke v. James*, 713 F.2d 1506, 1510 (11th Cir. 1983).

Other federal courts have agreed that abstention is particularly disfavored in actions involving 42 U.S.C. § 1983 claims.[44] As explained by the Ninth Circuit in *Tovar v. Billmeyer*, for example, the " 'unflagging obligation' of the federal courts to exercise the jurisdiction given them . . . is particularly weighty when those seeking a hearing in federal court are asserting . . . the right to relief under 42 U.S.C. § 1983. Under such circumstances conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which § 1983 assures."[45] The inappropriateness of abstention in § 1983 cases has been recognized by the courts because:

> Section 1983 opened the federal courts to private citizens, offering a *uniquely federal remedy* against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.[46]

This Court went on to note that when Congress enacted the predecessor to Section 1983,

> [It] clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights:

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44. *See, Toussaint v. Yockey*, 722 F.2d 1490, 1495 (9th Cir. 1984); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980); *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 302 (5th Cir. 1979); *Devlin v. Sosbe*, 465 F.2d 169 (7th Cir. 1972); *Marino v. Henckel*, 431 F.2d 1299, 1301 (5th Cir. 1970); *Gilbert v. School District No. 50*, 45 F.Supp. 505, 508 (D. Col. 1980); 1A J. Moore, *Moore's Federal Practice* ¶ 0.203[1], at 2112-2114 (1983).

45. *Tovar v. Billmeyer, supra* 609 F.2d at 1293.

46. *Mitchem v. Foster*, 407 U.S. 225, 239 (1972) (Emphasis added).

> it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindications of those rights; and it believed that these failings extended to the state courts.[47]

Therefore, abstention from Section 1983 cases, such as SignAd's, in favor of concurrent state proceedings is appropriate only under truly extraordinary circumstances.

In applying the factors announced in the *Colorado River* and *Cone* cases to the facts in this case, it is clear that the Court of Appeals' determination that abstention was unwarranted was correct. First, the District Court would not determine rights in property over which a state court had previously obtained jurisdiction. On the contrary, both SignAd and Sugar Land are seeking only *in personam*, rather than *in rem*, judgments against one another. This Court explained the difference between *in personam* and *in rem* jurisdiction as follows:

> If a court's jurisdiction is based upon its authority over the defendant's person, the action and judgment are denominated *"in personam"* and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called *"in rem"* or *"quasi in rem"*. The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.[48]

Clearly, SignAd and Sugar Land are seeking to impose personal obligations only against each other, rather than

47. *Id.* at 242.

48. *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977).

against all unnamed persons not before the court. SignAd, for example, is seeking an order requiring Sugar Land and Wolf to pay a damages award, and Sugar Land is seeking a prohibitory injunction restraining SignAd from operating the sign and a mandatory injunction requiring SignAd to remove the sign. Therefore, both SignAd's and Sugar Land's actions are *in personam*.

Indeed, there is no property over which any court may obtain jurisdiction since it is undisputed that Sign No. 1 was destroyed and no longer even exists. The Petitioners, however, reply that the state court still has jurisdiction over the confiscated sign repair materials, which apparently amounts to a few support poles and two by fours.[49] On the contrary, neither party has made any request to any court regarding the disposition of the sign repair materials, which are completely different from a constructed and operating sign. Outdoor advertising signs derive most of their value from their real property leases, advertising contracts, locations, and operating permits, rather than the mere collection of poles, lights, panels, and framework. Furthermore, since the Sugar Land Sign Ordinance prohibits the construction of off-premise signs, SignAd would be prohibited from taking the repair materials and building a new sign in Sugar Land anyway.[50] Accordingly, it would be impossible for any court to acquire jurisdiction over the only valuable and pertinent piece of property in this case, SignAd's sign, since the sign has been destroyed and no longer exists.

Second, as the Court of Appeals correctly observed, there is no inconvenience in proceeding with SignAd's

49. Petition for Writ of Certiorari, 14-15.

50. Petition for Writ of Certiorari, 3.

suit in the federal forum in Houston. The Defendants, however, complain that the federal forum is too inconvenient because, even though their lawyers are also located in Houston, their offices, city council minutes, permit applications and other documents, and the repair materials are located in Sugar Land.[51] They continue to explain that Houston is some 18 miles from Sugar Land, whereas their selected state forum of Richmond, Texas, is 9.5 miles from Sugar Land. The Defendants, therefore, would deny SignAd its federal forum because Richmond is about 8.5 miles closer to Sugar Land than Houston. However, this Court in *Colorado River* and *Cone* did not contemplate a mere comparison of the relative convenience of the state and federal forums. Rather, this factor requires a determination of whether the federal forum is so inconvenient that it amounts to an "extraordinary circumstance" sufficient to avoid the "virtually unflagging obligation" of the federal courts to exercise their jurisdiction. Moreover, this " 'unflagging obligation' of the federal courts to exercise the jurisdiction given them . . . is particularly weighty when those seeking a hearing in federal court are asserting . . . the right to relief under 42 U.S.C. § 1983. Under such circumstances conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which § 1983 assures."[52] Therefore, SignAd respectfully suggests that any inconvenience that might be encountered by the Defendants in traveling the eighteen miles to Houston would be far outweighed by SignAd's right to assert its claims, including those under Section 1983, in federal court.

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51. Petition for Writ of Certiorari, 15.

52. *Tovar v. Billmeyer, supra* 609 F.2d at 1293.

Third, although Sugar Land brought its action in state court prior to the filing of SignAd's federal suit, only 29 days elapsed between the filing of the two cases. Thus, very little weight should be given to the fact that Sugar Land won the race to the courthouse. As the court noted in *Evans Transportation Company v. Scullin Steel Company*:[53]

> If we gave weight to the fact that [plaintiff] filed its complaint a month after [defendant], we would be signaling future litigants in [plaintiff's] position that when sued they had better stay up all night and file their countersuit the next day rather than the next month. There is no point in inviting such races, and little precedent for doing it here. Even before the Supreme Court in *Colorado River* said that a federal suit should not be stayed or dismissed because of a pending parallel state suit except on the clearest of justifications, stays or dismissals were rarely upheld just because the state's suit had been filed a few weeks before the federal. Typically, the state's suit was well underway at the time the federal suit was filed, [citations omitted] or more complete relief was available in the state litigation, [citations omitted] or at least . . . the interval between the filing of the suit was longer.[54]

Furthermore, the Court of Appeals accurately recognized this Court's recent teaching that the "priority" element of the *Colorado River* balance "is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand. Thus, priorities should not be measured exclusively by which complaint was filed first, but rather in

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53. 693 F.2d 715 (7th Cir. 1982).

54. *Id.* at 718-719.

terms of how much progress has been made in the two actions."[55] In *Colorado River* itself, for example, the federal suit was actually filed first, but this Court pointed out as a factor favoring dismissal "the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss."[56] Likewise, the proceedings in SignAd's federal action have progressed much further than those in Sugar Land's state suit. As indicated previously, discovery was well underway in the federal action, including filing and responding to interrogatories, requests for admissions, document requests, and deposition notices.[57] On the other hand, there has been absolutely no activity in the state court action other than the filing of plaintiff's original petition and defendant's general denial. Accordingly, the "priority" element must also be weighed in favor of exercising jurisdiction.

Fourth, federal law clearly provides the rule of decision on the merits of SignAd's action alleging violations of 42 U.S.C. § 1983.

Fifth, as with any Section 1983 claimant, there is a very real possibility that SignAd's rights could not be adequately protected in the Fort Bend County proceedings.[58] The probability of such inadequate protection is precisely why Congress enacted Section 1983 as a "uniquely federal remedy" to be adjudicated in the fed-

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55. *Cone, supra* 103 S. Ct. at 940. *See Abcko Music, Inc. v. Beverly Glenn Music, Inc.*, 554 F.Supp. 410, 413 (S.D.N.Y. 1983).

56. *Colorado River, supra* 424 U.S. at 820.

57. Refer to text 5, *supra*.

58. *See Forehand v. First Alabama Bank of Dothan, supra* 727 F.2d at 1035.

eral court system.[59] Indeed, the posture of this case strongly demonstrates Congress' rationale. Sugar Land filed its action in Richmond, the county seat of the county in which it is located. As such, SignAd is faced with the difficult task of litigating its Section 1983 claim before a jury consisting of citizens who, if SignAd is successful, must find against their city and city officials and ultimately satisfy a judgment through their tax dollars.

Finally, only the avoidance of piecemeal litigation would tend to support abstention in this case. However, judicial diseconomy is not sufficient to warrant abstention.[60] As the court observed in *Caplinger v. Carter*,[61] for example,

> [T]he rationale of conserving judicial resources by staying a case when the parallel case is in another federal court simply does not apply as forcefully when the parallel case is pending in a state court. [Citations omitted] Abstention in such a case is reserved for more exceptional circumstances.
>
> Finally, the simple fact that parallel litigation exists in the state court has never been held to be an exceptional circumstance. Also, the mere fact that defendants will be put to a duplication of effort, if the court refuses to stay the case, is not an exceptional circumstance. [Citations omitted] In fact, it has been suggested that, "in the absence of a manifest congressional policy that a given case be litigated in the state courts, it may well be that it would be an abuse of discretion for a district court to stay or dismiss a federal action because of the pendency of

59. *Mitchem v. Foster, supra* 407 U.S. at 239.

60. *Evans Transportation Company v. Scullin Steel Company, supra* 693 F.2d at 717.

61. 541 F.Supp. 716 (D. Kan. 1982).

> a similar state proceeding." 1A Moore's Federal Practice, ¶ 0.203[4], at 2141. Our dockets are crowded, but it would be clearly erroneous to stay this case on that ground.[62]

Furthermore, this Court based its decision in *Colorado River* largely because of the clear congressional mandate under the McCarran Amendment that water rights should be adjudicated in a single proceeding.[63] The contrary presumption is present in Section 1983 litigation.[64]

The posture of this litigation simply does not present the "exceptional circumstances" contemplated by this Court in *Colorado River* and *Cone* for abstention. Thus, the Court of Appeals correctly applied the doctrine, and the Petition for Writ of Certiorari should be denied.

CONCLUSION

The decision of the Court of Appeals, in which the District Court's order was reversed and remanded, was not such a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Accordingly, SignAd

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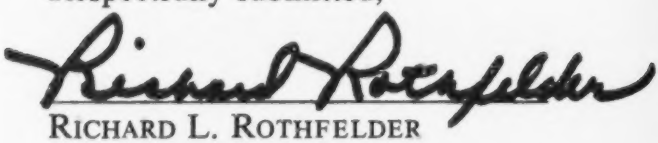
62. *Id.* at 718-719.

63. *Colorado River, supra* 424 U.S. at 820.

64. *Forehand v. First Alabama Bank of Dothan, supra* 727 F.2d at 1036.

requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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